U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0437 BLA

CHARLES N. WILLIAMS Claimant-Respondent v. BRANHAM & BAKER COAL COMPANY, INCORPORATED c/o EAST COAST RISK MANAGEMENT and Self-Insured by QUAKER COAL COMPANY, c/o AEP EAST COAST RISK MANAGEMENT Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/30/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits (2017-BLA-06140) of Administrative Law Judge Larry A. Temin rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). Claimant filed his claim on September 30, 2016.

The administrative law judge credited Claimant with 13.79 years of underground coal mine employment and therefore concluded he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). He further found, however, Claimant established legal pneumoconiosis arising out of coal mine employment[2] and total disability due to legal pneumoconiosis.[3] Thus, he awarded benefits.

On appeal, Employer asserts the administrative law judge erred in finding Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The scope of review exercised by the Benefits Review Board is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational,

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when he has at least fifteen years of underground or substantially similar surface coal mine employment, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018), as implemented by 20 C.F.R. §718.305.

[2] In light of her finding Claimant established legal pneumoconiosis, the administrative law judge determined disease causation (Claimant's pneumoconiosis arose out of his coal mine employment) was established. 20 C.F.R. §718.203(b); Decision and Order at 25; *see Kiser v. L&J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006).

[3] The administrative law judge noted Employer withdrew the issue of total disability at the hearing and nevertheless found the evidence sufficient to establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 25; Hearing Transcript at 17. We affirm the administrative law judge's finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

supported by substantial evidence and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Entitlement - 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[5] and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Existence of Pneumoconiosis – Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[6] 20 C.F.R. §718.201(b). The United States Court of Appeals for the Sixth Circuit holds a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014). The administrative law judge considered the opinions of Drs. Nader, Green, Rosenberg, and Dahhan. Drs. Nader and Green opined Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to his coal mine dust

[4] Claimant's most recent coal mine employment occurred in Kentucky. Director's Exhibit 3; Hearing Transcript at 24-25. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] Claimant cannot establish invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis in the record. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[6] The administrative law judge determined Claimant did not establish clinical pneumoconiosis by a preponderance of the x-ray and medical opinion evidence. Decision and Order at 18.

exposure and smoking.[7] Director's Exhibit 8; Claimant's Exhibit 1. Dr. Rosenberg diagnosed COPD and emphysema caused by smoking. Director's Exhibits 2, 6 at 13. Dr. Dahhan opined Claimant has advanced emphysema and a severe obstructive ventilatory impairment caused by smoking. Director's Exhibit 16; Employer's Exhibit 5. The administrative law judge credited Drs. Nader's and Green's diagnoses of legal pneumoconiosis as reasoned, documented and "consistent with the position of the Department of Labor (DOL) as outlined in the preamble" to the 2001 regulatory revisions. Decision and Order at 20-21. In contrast, he discredited the contrary opinions of Drs. Rosenberg and Dahhan, holding neither physician adequately explained why coal dust exposure was not a contributing cause of claimant's COPD. *Id*. at 22-25.

Employer maintains on appeal that the opinions of Drs. Nader and Green are not well-reasoned because they did not explain how coal mine dust contributed to Claimant's COPD. Employer's Brief at 7-8, 10-11. Employer also contends the administrative law were based solely on Claimant's symptoms and they must be based on "some objective medical evidence." *Id*. at 9, 11-12. Employer further argues the administrative law judge erred in crediting the opinions of Drs. Nader and Green because they considered an inaccurate coal mine employment history, and he "chose to assume" the physicians' opinions would not change if they had considered an accurate employment history. Employer's Brief at 9, 11. These contentions do not have merit.

The administrative law judge permissibly determined the opinions of Drs. Nader and Green are adequately reasoned and documented, as both physicians diagnosed COPD based on Claimant's years of coal mine employment with heavy coal and rock dust exposure; his symptoms of chronic coughing, wheezing, mucus expectoration and shortness of breath; and his abnormal pulmonary function studies which showed a very severe obstructive impairment. Director's Exhibit 8; Claimant's Exhibit 1; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 20, 25. In addition, he reasonably

[7] Employer argues the administrative law judge erred in crediting the opinions of Drs. Nader and Green because they considered an inaccurate smoking history. Employer's Brief at 7. Dr. Nader considered a thirty-seven year history, and Dr. Green considered a forty year history. Director's Exhibit 8; Claimant's Exhibit 1. Employer has failed to explain why the opinions of Drs. Nader and Green were undermined by their consideration of smoking histories greater than both the history the administrative law judge found and the smoking history it proposes. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference."); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

found their opinions that coal mine dust exposure induces obstructive lung disease are consistent with the DOL's position in the preamble to the revised regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 20-21, *citing* 65 Fed. Reg. 79,920, 79,938, 79,940, 79,943 (Dec. 20, 2000).

The administrative law judge also directly addressed the coal mine employment histories the physicians relied on, observing he found the Claimant had 13.79 years of coal mine employment whereas Drs. Nader and Green considered a sixteen year history. Decision and Order at 21; Director's Exhibit 8; Claimant's Exhibit 1. Within his discretion, he found that because they relied on the results of their examinations of Claimant and considered his substantial smoking history, it was "reasonable to infer" their opinions "would not change if they considered a coal mine employment of slightly less duration." *Id.* at 21-22; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Finally, he rationally determined their opinions that coal mine dust was a partially contributing factor in Claimant's COPD were sufficient to meet the requirement that Claimant's impairment was caused "in part" by his coal mine dust exposure. Decision and Order at 21; *see Groves*, 761 at 598-99. Thus, we affirm the administrative law judge's finding the opinions of Drs. Nader and Green well-reasoned and entitled to probative weight on the issue of whether Claimant has legal pneumoconiosis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 20-22, 25; Director's Exhibit 8; Claimant's Exhibit 1.

Employer next asserts the administrative law judge erred in finding Dr. Rosenberg did not explain his opinion that Claimant does not have legal pneumoconiosis. Employer's Brief at 12-13. Employer specifically alleges that in discrediting Dr. Rosenberg's opinion, "the [administrative law judge] seems to take the position that 65 Fed. Reg. at 79943 provides that coal dust exposure may cause chronic obstructive pulmonary disease with associated decrements in FEV 1 and the FEV1/FVC ratio. However, this is not what the [preamble] says." *Id*. at 13. Contrary to Employer's argument, the Sixth Circuit has held it is appropriate for an administrative law judge to discredit a physician's opinion on this basis. *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F3d 483, 491 (6th Cir. 2014). Accordingly, the administrative law judge permissibly discredited Dr. Rosenberg's opinion.

Employer further argues the administrative law judge applied a "stricter, more stringent standard" in assessing the opinions of Drs. Rosenberg and Dahhan than he applied when assessing the opinions of Drs. Nader and Green. Employer's Brief at 13-15. We disagree. Contrary to Employer's assertion, the administrative law judge did not require Drs. Rosenberg and Dahhan to "rule out" coal mine dust exposure or show it did not contribute "at all" to Claimant's impairment. *Id.* He stated correctly that Claimant bears the burden of establishing legal pneumoconiosis, which includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or

substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); Decision and Order at 15, 19. He then permissibly discredited the opinions of Drs. Rosenberg and Dahhan based on his determination that their explanations for finding Claimant's coal mine dust exposure did not contribute to his impairment were insufficient. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 22-24; Employer's Exhibits 2, 5, 6; Director's Exhibit 16. He therefore rejected their opinions as inadequately reasoned, rather than due to their alleged failure to satisfy a heightened legal standard. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 22-24.

We therefore affirm the administrative law judge's findings that the legal pneumoconiosis opinions of Drs. Rosenberg and Dahhan are not adequately explained as rational and supported by substantial evidence, and the opinions of Drs. Nader and Green are reasoned and entitled to the greatest probative weight. Accordingly, we further affirm the administrative law judge's determination the medical opinion evidence establishes Claimant suffers from legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 25.

Disability Causation

Prior to evaluating the medical opinions, the administrative law judge articulated the proper standard, consistent with the regulations, for establishing disability causation, i.e., Claimant must prove that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and Order at 25-26. Employer alleges the administrative law judge's analysis was flawed because he "extrapolate[d]" from the diagnoses of COPD and emphysema to find disability causation. Employer's Brief at 16. This contention is without merit. The administrative law judge permissibly interpreted Dr. Green's opinion that Claimant is disabled by chronic respiratory failure and COPD constitutes a diagnosis of total disability due to legal pneumoconiosis because the administrative law judge found Claimant's COPD is legal pneumoconiosis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 26; Claimant's Exhibit 1. In addition, he rationally discounted the opinions of Drs. Rosenberg and Dahhan that Claimant's totally disabling respiratory impairment is not caused by pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 19; Employer's Exhibits 2, 5, 6; Director's Exhibit 16. We therefore affirm the administrative law judge's determination Claimant established his disabling respiratory impairment is caused by legal pneumoconiosis. 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge